Supreme Court, U.S.
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No. 93-2058

In The

Supreme Court of the United States

October Term, 1994

W.R. GRACE & COMPANY and
W.R. GRACE & COMPANY-CONN.,

Petitioners,

v.

MDU RESOURCES GROUP, doing business as
Montana-Dakota Utilities Co., Inc.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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COUNTER-STATEMENT ON JURISDICTION

Petitioner's ("Grace") jurisdictional statement is inaccurate. Grace never filed a petition for rehearing with the Eighth Circuit. After Chief Judge Richard Arnold rendered the panel's decision, Grace filed a "Suggestion for En Banc Disposition." The order denying this suggestion also denied a "petition for rehearing by the panel" [A-20] because the Eighth Circuit now treats all in banc suggestions as including petitions for panel rehearing. *See* 8th Cir. R. 35A (c)(4); *Missouri v. Jenkins*, 495 U.S. 33, 50 (1990) (noting merits of such a rule).

COUNTER-STATEMENT OF THE CASE

This is a diversity based product liability action. Respondent ("MDU")[1] claimed at trial that Grace was negligent and strictly liable for putting asbestos in its Monokote fireproofing and for its undisputed failure to warn about the asbestos in Monokote [A-3; Tr. 2288-2289]. Grace claimed that Monokote never injured MDU's property [Petition 6]; that it "had no knowledge that any nonindustrial exposure to asbestos in its products caused any significant health risk" [Petition 6]; and that no asbestos substitute was available at the time of sale [A-3, 14].[2] Grace also raised the North Dakota statute of limitations as an affirmative defense [A-3].

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[1] MDU Resources Group, Inc. is a Delaware corporation traded on the New York Stock Exchange. It has no parent company or partially owned subsidiary. Rule 29.1.

[2] Further background is available in the many decisions involving Monokote, *see, e.g., State Farm Mutual Automobile Ins.*

The liability instructions on what MDU had to prove to recover never asked the jury to determine whether or not Monokote contaminated MDU's building with asbestos fibers. The statute of limitations instruction and special question also failed to ask the jury to determine if or when MDU's property was contaminated or otherwise injured [A-5-6; L-4].

MDU appealed the judgment entered against it. The Eighth Circuit held that the statute of limitations instruction incorrectly stated North Dakota law; that two of the numerous evidentiary errors it cited were not harmless error; and that the District Court allowed Grace's cross-examinations "to get out of hand" when the District Court permitted Grace to try its statute of limitations defense during MDU's case-in-chief [A-6-18].

REASONS FOR DENYING THE WRIT

The "Questions Presented" were not preserved for review, have no basis in fact, and do not meet this Court's Rule 10.1 considerations even if true.

Co. v. W.R. Grace & Co.-Conn., ___ F.3d ___, 1994 WL 189638 (7th Cir. May 17, 1994); *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987); *Clayton Center Assoc. v. W.R. Grace & Co.*, 861 S.W.2d 686 (Mo.App. 1993), and in the decisions certifying nationwide class actions against Grace and others. *See Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993); *In Re Asbestos School Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 & 915 (1986).

I. GRACE FAILED TO PRESERVE ANY OF ITS QUESTIONS PRESENTED

The first "Question Presented" claims that the Eighth Circuit re-examined the jury verdict when the Court made a three sentence reference to the 1988 HTI contamination report and the asbestos levels later found in MDU's building [Petition 9-10, *citing* A-1, 3]. MDU gave record citations to these facts in the opening brief it filed in the Eighth Circuit [Appellant Brief 1]. The Appellee brief Grace filed in the Eighth Circuit never challenged these citations, never suggested that the jury was instructed to determine whether MDU's building was contaminated, and never hinted that the facts MDU cited were inconsistent with the liability verdict.

The second and third "Questions Presented" claim that the instructional and evidentiary errors were harmless [Petition 23-29]. MDU's opening brief gave record citations to the facts which showed the prejudice it suffered from these errors [Appellant Brief 10, 44, 48-49]. Grace's Appellee brief again never presented any evidence or argument that these instructional and evidentiary errors, if error, were harmless.

MDU's reply brief in the Eighth Circuit pointed out Grace's numerous failures to argue harmless error [Appellant's Reply Brief 1].

The idea that the Constitution forbids an appellate court from relying on facts unopposed on appeal is absurd. If Chief Judge Arnold and the other panel members violated the Seventh Amendment by relying on facts Grace failed to dispute, then this Court is likewise guilty every time it applies its Rule 15.1 in a jury case. Rule 15.1

admonishes counsel to raise any perceived misstatements of fact or law

> *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition (emphasis in original).

Grace waived all the questions it seeks to present by failing to raise any of them in the Court of Appeals. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (per curiam) (writ of certiorari dismissed as improvidently granted because the issues presented were not raised in the Court of Appeals).

II. GRACE'S CLAIM OF APPELLATE FACT-FINDING IS BASELESS

The Eighth Circuit did not re-examine facts tried by the jury because the jury was never asked to determine whether MDU's property was contaminated, and the facts the Court cited are indeed facts because they were undisputed at trial as well as on appeal.

Grace misstates the record when it says the jury was "specifically instructed to find whether MDU's claim of asbestos fiber release and property contamination made the Monokote defective and unreasonably dangerous" [Petition 7]. The jury never received an instruction or special question which asked it to determine whether MDU's building was contaminated.

The instructions Grace cites to claim otherwise was the "Statement of the Case" instruction which introduced

the parties claims [L-6] and an instruction which introduced MDU's design defect claim that it was "the addition of the asbestos" that made Monokote defective [L-9]. Neither instruction was a liability instruction on what MDU had to prove to recover. The liability instructions on the "essential elements of strict liability," on the definition of "unreasonably dangerous," and on failure to warn never mentioned contamination as a requirement or even as a factor for the jury to consider [Grace's Eighth Cir. Appendix C-0018, C-0019, C-0020]. As the Petition notes, the Eighth Circuit did not hold that contamination was the injury necessary to recover under North Dakota tort law until "several months *after* this jury verdict was entered" [Petition 23 at n. 14 (emphasis in original), *citing Tioga Public School District No. 15 v. U.S. Gypsum*, 984 F.2d 915 (8th Cir. 1993) (ND law)].

Grace's further charge that the Eighth Circuit failed to give the liability verdict sufficient deference [Petition 19] ignores that the verdict is indelibly tainted with trial error.

Besides the evidentiary errors Grace now says are harmless [Petition 27-29], Grace offered into evidence as an exhibit a *Science* article one of Grace's litigation experts co-authored [A-4 n. 2].[3] The article's underlying data was largely generated by defendants as part of defending asbestos building cases, and the article itself is not an original study, but the opinions of the authors on what they believe some of the literature suggests [To

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[3] This "Science" article is the source Judge Bowen cited when he commented on what "most experts" believe [Petition 19 n. 10].

1604-1606]. The article's accompanying media publicity was generated by Grace's alter-ego, the Safe Building Alliance,[4] and drew a number of vigorous responses, including one from the Environmental Protection Agency [Tr. 1608; 1614-1616; 3635-3651].

After the District Court explained to the jury why learned treatises are not admissible as exhibits, *see* Fed.R.Evid. Rule 803(18), it overruled MDU's objection and admitted the *Science* article as an exhibit after it told the jury that the article showed the impact Grace's expert "played in the development of thinking in this area" [Tr. 3205]. The co-author who testified for Grace later admitted that he deliberately destroyed his file on the article so that lawyers could not question him about it [Tr. 3285-3288]. The Eighth Circuit made a point to note that the District Court could reconsider the article's admissibility on remand [A-4 n. 2].

Even more egregious, the District Court also allowed Grace's cross-examinations to "get out of hand" [A-18], broke its assurance to MDU that Grace's cross-examinations would be limited to the scope of direct [A-4], and "prodded MDU to question its witnesses regarding Grace's statute-of-limitations defense" during MDU's case-in-chief [A-5]. Describing the District Court's action as "prodding" was kind. During MDU's case-in-chief, the

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[4] *See In Re Asbestos School Litigation*, 842 F.2d 671, 675 (3d Cir. 1987) (describing alter ego relationship between Grace and the Safe Building Alliance and the Alliance's goal of reducing liability by encouraging building owners to forego asbestos removals).

District Court diverted the jury's attention away from Grace's liability to Grace's statute of limitations defense:

> I would like to get back into the question of the issue of whether or not Montana-Dakota knew or should have known by June 4, 1984 or before June 4, 1984 of the degree of the problem it had because of the asbestos in the building [Tr. 2397].

The District Court later realized that it improperly shifted the burden of proof on Grace's affirmative defense [Tr. 2463-65], noted that a curative instruction was "well advised" [Tr. 2458], yet decided not to give one [Tr. 2504]. No "Question Presented" challenges the Eighth Circuit's holding on this issue.

The contamination facts the Eighth Circuit cited are also established facts because Grace failed to challenge them at trial as well as on appeal.

Grace again misstates the record when it suggests that the 1988 HTI contamination report the Eighth Circuit cited [A-1, 3] was "hotly disputed at trial" [Petition 9]. Grace listed the HTI report as defense exhibit D-671 in its pre-trial exhibit list, never objected when MDU admitted the report into evidence [Tr. 147-48], and never argued at trial that the report showed a lack of contamination. Grace instead used the HTI report in its cross-examinations and in its closing jury argument to argue that MDU's building contained only "trace" contamination [Tr. 287-300; 593-94; 872-77; 4228-4229]. The head of HTI testified that significantly more asbestos would have been found had the 1988 samples been analyzed by the more powerful microscope recommended in a 1989 Environmental Protection Agency draft protocol [Tr. 4024].

Grace also never objected to the introduction of evidence about the costly operation and maintenance program MDU instituted shortly after it received the HTI report in 1988 [Tr. 161]. By the time of trial in 1990, MDU had used this "O & M" plan to decontaminate its building and to institute procedures designed to avoid further asbestos fiber releases pending the fireproofing's removal [Tr. 161-181]. The testimony Grace cites from MDU's President on the lack of contamination concerned the building's condition as of 1990 [Petition 9 n. 3], some two years after MDU began its decontamination procedures.

Grace did raise a now obsolete "*Frye* objection"[5] when MDU offered into evidence the asbestos fiber levels which were later found in the building's settled dust and the levels normal maintenance and custodial activities would have produced had MDU not implemented its O & M plan [A-3 (citing Pl.Ex. 553)]. The District Court overruled the objection because Grace offered nothing to challenge the dust sampling's scientific methodology [Tr. 812]. Grace failed to mention this ruling when it told this Court that the levels the Eighth Circuit cited have "no scientific basis" [Petition 10].

Grace also failed to present any evidence contradicting MDU's dust sampling results. It instead challenged dust sampling *in toto* by arguing that asbestos fibers previously released into the air and later found in settled dust are insignificant. Grace claimed that a building is

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[5] *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) has since held that the admissibility of expert testimony is governed by the Federal Rules of Evidence, not the more stringent "*Frye* standard."

not truly "contaminated" unless air sampling shows that asbestos fibers taken directly from indoor air exceed governmental clearance levels [Tr. 4233-37 (closing jury argument)]. Grace repeats the same argument here [Petition 9 n. 3; 10 n. 4] without disclosing the apparently unanimous authority to the contrary.[6]

In sum, there was never a jury determination on contamination for the Eighth Circuit to re-examine and the facts the Court cited are indeed facts because they were unchallenged at trial and on appeal.

III. GRACE'S CLAIM OF HARMLESS INSTRUCTIONAL ERROR IS BASELESS AND CONTRADICTS THE POSITION GRACE HAS TAKEN IN AT LEAST TWO COURTS OF APPEAL.

Besides failing to argue harmless instructional error in its Appellee brief, Grace misstates the record when it says that the Court ignored portions of the statute of limitation instruction [Petition 24]. The Court cited the instruction fully [A-5-6]. Grace's problem is that the three-pronged statute of limitation instruction [A-5-6] and special question [L-4] never asked the jury to determine when MDU's property was injured.

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[6] *See Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 868 (10th Cir. 1993) (asbestos "contamination" found in surface dust located on top of display case and on carpeting); *Tioga Public School*, 984 F.2d at 917-919 (citing dust samples to find "contamination"); *City of Greenville*, 827 F.2d at 979-980 (citing "contamination" found on top of computer surfaces).

Under governing state law, a compensable injury must occur and manifest itself before the statute of limitations can begin to run [A-7-8, *citing Wall v. Lewis*, 366 N.W.2d 471, 473 (N.D. 1985)] and, as Grace notes, the Eighth Circuit held that the injury which must occur and manifest itself is that MDU's building *"had been* contaminated" [Petition 27, *citing* A-11 (emphasis in Petition)].[7] The "Questions Presented" do not challenge this North Dakota accrual standard.[8]

Grace also defines the injury to property as actual contamination when it suits its purposes. To contest class certification, Grace told the Fourth Circuit that a "claim that may be heard in diversity exists only when there is product-caused 'contamination' producing damage exceeding the jurisdictional minimum" [Appellant Reply Addendum 4-5 (excerpt from Appellant brief Grace filed in *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993)]. To extend its insurance coverage over several policy periods, Grace more recently told the Second Circuit that the courts "almost always rule" that the injury which is recoverable in tort and which triggers the statute of limitations is "fiber release, years after installation" [MDU's Response to In Banc Suggestion, Ex. A

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[7] This is in accord with the overwhelming authority. *See, e.g., Clayton Center Assoc., supra; May v. AC & S, Inc.*, 812 F.Supp. 934 (E.D. Mo. 1993); *State Farm Mutual Automobile Ins. Co. v. W.R. Grace & Co-Conn.*, 834 F.Supp. 1046 (C.D. Ill. 1992) and cases cited therein at 1048-1049.

[8] While Grace criticizes this state law standard [Petition at 26-27 and n. 16], "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Rule 14.1(a).

15-16 (excerpt from brief Grace filed in support of its Petition for Rehearing in *Maryland Casualty Ins. Co. v. W.R. Grace & Co.*, 4 F.3d 155 (2d Cir. 1993), *amended on rehearing* 1993 W.L. 658199, in banc rehearing denied (July 15, 1994)].

There is, of course, a vast difference between learning that a defendant may be "possibly liable" because its product "might pose a hazard" [A-5-6] and learning that you have been injured. *United States v. Kubrick*, 444 U.S. 111 (1979) drew an identical distinction when it held that it is the discovery of an injury and its cause – not the discovery of possible liability – that triggers the Federal Tort Claims Act's statute of limitations. MDU's opening brief in the Eighth Circuit made this same point when it noted that the erroneous instruction allowed the jury to find that MDU's claims were time barred before MDU was injured and could have brought suit [Appellant Brief 10].

Grace's suggestion that MDU's closing jury argument somehow cured this instructional error elevates MDU's counsel to the level of law-giver and ignores controlling state law. This Court cannot infer a "defect in [MDU's] proof rather than a defect in the trial court's instruction" [Petition 25] because, in North Dakota, it is the defendant who has the burden of proof on a statute of limitations defense. *McCarter v. Pomeroy*, 466 N.W.2d 562 (N.D. 1991).

The suggestion further ignores the additional prejudice MDU suffered when Grace presented evidence on MDU's size to ostensibly show when MDU should have known that Monokote "might pose a hazard." The Eighth

Circuit cited just some of the evidence improperly admitted under the erroneous instruction [A-5 n. 3].

IV. GRACE'S CLAIM OF HARMLESS EVIDENTIARY ERROR IS BASELESS

Besides failing to argue harmless evidentiary error in its Appellee brief, Grace takes the Eighth Circuit to task for "effectively nullifying" the harmless error statute [Petition 29] when the Court actually applied the standard established in *Kotteakos v. United States*, 328 U.S. 750 (1945). *Kotteakos* held:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . . *But if one cannot say, with fair assurance,* after pondering all that happened without stripping the erroneous action from the whole, *that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.* The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. *Id.* at 765 (emphasis supplied).

This "cannot say" harmless error standard is identical to the one the Eighth Circuit applied [A-17-18].[9]

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[9] Grace's claim that it failed to find any precedent "enunciating such a relaxed standard" is remarkable [Petition 29 n. 17]. *Kotteakos* is the bedrock for this Court's harmless error jurisprudence, and Grace cited *McDonough Power Equipment v.*

Grace also misstates the record when it suggests that the Court found that the exclusion of P-83A warranted a new trial simply because it "could not say" it was harmless [Petition 28-29]. The Eighth Circuit went on to note that what Grace knew and when it knew it was critical to MDU's failure to warn claims [A-17-18].

It was undisputed at trial that Grace never warned MDU about the asbestos in Monokote [Tr. 2288-2289]. The negligence instruction on duty to warn instructed that a manufacturer's duty is "in proportion with its actual knowledge of the risks" at the time the product was manufactured and sold [Appellant's Eighth Cir. Addendum 11]. The strict liability instruction on duty to warn similarly instructed that Grace "had to anticipate a danger" before its failure to warn rendered the product defective [Grace's Eighth Circuit Appendix C-0017].

Grace claimed at trial that "it had no knowledge that nonindustrial exposure to asbestos in its products caused any significant health risk" [Petition 6]. P-83A, entitled "Asbestosis," shows that Grace's insurance carrier warned Grace's Safety Administrator about the relationship between cancer and the exposure to asbestos-containing building materials after the materials are used in buildings [A-4]. The District Court initially admitted the exhibit [Tr. 2432-2434], but reversed itself after Grace presented extensive argument and evidence devoted to the exhibit, including a deposition, taken during trial, of Grace's records custodian [Tr. 1310-1342; 1637-1639;

Greenwood, 464 U.S. 548 (1984) [Petition 21-22] which in turn cited *Kotteakos. McDonough*, 464 U.S. at 553.

1730-1731; 2415-2451; 2481-2490]. During these arguments, the District Court described the warning Grace received from its insurance carrier as "a pretty critical piece of paper" and noted that it "establishes a level of knowledge" that "throw[s] a cloud on the position of W.R. Grace" [A-17, *citing* Tr. 2422, 2440, 2445].

Grace understandably devotes little attention to the exclusion of MDU's feasibility evidence. The feasibility of an alternative safer design has been called the "very heart" of a design defect case, *see* Annot., *Burden of Proving Feasibility of Alternate Safe Design in Product Liability Action Based on Defective Design*, 78 A.L.R.4th 154, 157 (1990), and, under the governing state law, whether or not Grace could have replaced the asbestos in Monokote without impairing the product's usefulness was a primary consideration in MDU's claim that the "addition of asbestos" made Monokote defective [L-9]. *Spieker v. Westgo, Inc.*, 479 N.W.2d 837, 841 (N.D. 1992).

Grace presented testimony at trial that it was impossible to make an asbestos-free Monokote at the time it sold the asbestos fireproofing to MDU in 1968 [A-3, 14]. In rebuttal, MDU offered evidence that Cellufloc – the substitute Grace actually used in the asbestos-free Monokote it developed in 1973 – had been available since 1943 [A-3-4 and n. 1; 14-15 and n. 11]. MDU also had its expert make an offer of proof on this same point [Tr. 1163-1164], but the District Court excluded any evidence showing that the asbestos substitute Grace actually used in 1973 was available in 1968 [A-14 and n. 11].

V. NONE OF THE RULE 10.1 CONSIDERATIONS ARE PRESENT EVEN IF GRACE'S ALLEGATIONS ARE ALL TRUE

This diversity case presents no federal question. Grace cites no conflict among the federal Circuit Courts of Appeal. Grace instead wants this Court to say that Chief Judge Arnold and the other panel members "so far departed from the accepted and usual course of judicial proceedings" that this Court should exercise its supervisory power. Rule 10.1(a). Even if Grace preserved this allegation (it did not), and even if an exercise of this Court's supervisory power would otherwise be warranted (it is not), this case is not one to decide the questions Grace presents.

Grace even now does not dispute that the District Court allowed its cross-examinations to "get out of hand," permitted it to try its statute of limitations defense during MDU's case-in-chief [A-18], and actually "prodded" MDU to question its witnesses about the affirmative defense during MDU's liability presentation [A-5]. It was these improper cross-examinations (with the District Court's "prodding") which allowed Grace to claim in MDU's case-in-chief that the statute of limitations had run, yet then turn around and schizophrenically claim during its own case-in-chief that MDU's property was never injured [A-12 n. 9].

The liability and statute of limitation verdicts are so tainted with this undisputed error that no decision on the "Questions Presented" could effect MDU's right to a new trial. As Grace aptly notes, the harmless error statute

applies to all federal appellate courts, including this Court [Petition 22].

CONCLUSION

The "Questions Presented" were not preserved, have no basis in fact, and do not warrant this Court's attention. The Petition should be denied.

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